AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/689
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 689

Case No. 761: METCALFE

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 26 July 1993, Barry Gordon Metcalfe, a former staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"...

(d) [To order payment of] the difference between the amount paid and his entitlement at level A.5 under the Mobility & Hardship Allowance from 1 July 1990 until 14 February 1992, almost 20.5 months.

(e) ... that interest be paid on the sum due from 1 July 1990 until the date the allowance is finally paid as it should have been a lump-sum payment.

[f] Also, [that] an award be determined to compensate for the effect on the Applicant's health and state of mind caused by protracted argument and ill feeling during the period in question."

Whereas the Respondent filed his answer on 13 December 1993;

Whereas, at the request of the President of the Tribunal, on 10 and 24 May 1995, the Respondent submitted additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Conference for Trade and Development (UNCTAD) in 1975, as a Port Operations Expert. He served at UNCTAD through 31 October 1979, and again from 1 May 1980 through 30 September 1987, when he resigned. On 1 November 1987, the Applicant entered the service of the International Labour Organization (ILO). With effect from 27 July 1989, he was transferred to the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), as an Economic Affairs Officer on a two year fixed-term appointment at the P-4, step X level. By way of interagency transfer, the Applicant entered the service of ICAO on 13 May 1990, as a Training Expert in ICAO's Inter-Regional TRAINAIR Project in Amman (Jordan), on an appointment for 18 months. His appointment was extended for three months, through 12 February 1992, when the Applicant separated from ICAO.

With effect from 1 January 1988, the International Civil Service Commission (ICSC) enhanced the amount and structure of the assignment allowance by a mobility and hardship allowance, for staff who met the requirement of five years continuous service in the UN common system. Correspondence ensued among officials of UNCTAD, ILO, and ESCAP regarding efforts to bridge the thirty-one day break in the Applicant's service prior to his joining ILO on 1 November 1987, in order that he could benefit from the new regulations. On 27 July 1990, the Applicant was advised that these efforts had been unsuccessful and he was denied a mobility and hardship allowance. On 5 September 1990, the Applicant requested the UN Secretary General to review this decision. Not having received a reply to his request, on 12 December 1990, he lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 17 June 1991. Its conclusion and recommendation read as follows:

"Conclusion and Recommendation

32. The Panel unanimously

1. Finds that the Appellant had no real intention to resign from the common system and that he had apparently acted on the advice of his future employer;

2. Finds that the Administration made commendable efforts to find a solution to the problem created by the Appellant's resignation from UNCTAD;

3. Finds that provisions of staff rule 104.3 offer a suitable way to rectify the situation in the best interest of the Administration as a good employer and of the Appellant as a staff member with a long period of service in the common system.

33. Consequently, the Panel unanimously recommends that the Appellant be offered to be reinstated as provided in staff rule 104.3."

On 3 July 1991, the Officer-in-Charge, Department of Administration and Management, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary General has re-examined your case in the light of the Board's report. He cannot, however, accept the Board's recommendation. Under staff rule 104.3, a former United Nations staff member, who is re-employed by the Organization within twelve months of his/her separation may be reinstated, in which case his or her service will be considered as having been continuous and all separation payments will have to be returned. You were not, however, re-employed by the United Nations on 1 November 1987 but employed by the International Labour Organization (ILO). Accordingly, the above-mentioned provision concerning reinstatement could not be applied in your case. Considering, however, the exceptional circumstances of your case, the Secretary General has decided to exercise his authority under staff rule 112.2(b) to grant you, as an exception to staff rule 103.22(h), in force at the time, the difference between the basic rate and the mobility rate of the assignment allowance for the period from 27 July 1989 to 15 May 1990 during which you served with the United Nations."

In the meanwhile, by letter dated 4 April 1990, the Applicant was advised of ICAO's intention to offer him an appointment. He received a copy of the ICAO Field Service Staff Rules (FSSR) and Personnel Instructions and information as to the entitlements he would receive. On 1 May 1990, the Applicant was offered an appointment with ICAO, which he accepted on 17 May 1990, with effect from 13 May 1990.

The offer of appointment stated "Service under this letter of appointment shall be deemed continuous on service under the contract with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). You shall retain all rights and benefits accrued in respect of your United Nations service from 1 November 1987 through 12 May 1990." It also stated "You will not be entitled to receive from the International Civil Aviation Organization any payments, subsidies, expenses or emoluments other than those specified ... in this letter or those applicable in the ICAO Field Service Staff Rules."

After a period of five weeks in Montreal for a briefing and workshop at ICAO Headquarters, the Applicant was granted leave from 19 June 1990 and assigned a mission in the United Kingdom to be undertaken en-route to Jordan. Following this mission, the Applicant arrived in Jordan, his duty station, on 2 July 1990. He was paid an installation grant and an assignment grant, in accordance with the ICAO FSSR in force at the time of his appointment.

With effect from 1 July 1990, new provisions for the payment of assignment grant and mobility and hardship allowances were established for the UN Common System, and incorporated in rules 3.7 and 3.8 of the ICAO FSSR. On 1 August 1990, the UN Administration issued administrative instruction ST/AI/363, providing that, for the purpose of establishing eligibility for the mobility and hardship allowance, "the requirement of five years consecutive service may be considered as met if the staff member has accumulated five years of service within a period of six consecutive years."

The Applicant requested but was denied the benefit of the new provisions of the FSSR as well as ST/AI/363. In a letter dated 31 December 1990, the Applicant requested the Secretary General of ICAO to review the administrative decisions that had been taken regarding his entitlement to the assignment grant and to a mobility and hardship allowance. In a reply dated 6 March 1991, the Secretary General of ICAO confirmed that these decisions were taken in conformity with the ICAO FSSR in force at the time of his recruitment.

On 19 March 1991, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB), with respect to three claims: (a) that he should have been paid an assignment grant in accordance with Section 3.7 of the ICAO FSSR which came into effect on 1 July 1990; (b) that he should have been eligible for the mobility and hardship allowance which came into effect on 1 July 1990; and (c) that his salary increment date should not have changed when he joined ICAO.

The AJAB adopted its report on 8 April 1993. Its conclusions read, in part, as follows:

> **"Conclusions**
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> 39. ... the Board concludes that the Appellant should have been paid the assignment grant according to paragraph 3.7 of the FSSR which came into effect on 1 July 1990. It therefore recommends that he be paid the difference between the assignment grant calculated according to [paragraph] 3.7 as revised on 1 July 1990 and the installation grant actually paid to him.
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> 40. Concerning the payment of the mobility and hardship allowance, the Board concludes that the Appellant did not have the requisite 5 years of continuous service on joining ICAO necessary to qualify for the payment of this allowance and that on this point his appeal fails.
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> 41. In the matter of the Appellant's salary increment date the Board concludes that his transfer to ICAO constituted a promotion, and although the rules in force at the time are not specific on the point, the Secretary General acted in accordance with established practice in amending his increment date to the date of his joining ICAO. ...

42. Concerning the conclusion given in paragraph 39 above, the Board concurs with the assertion of the Appellant that the wording of the revised paragraph 3.7 of the FSSR is contradictory in sub-paragraph c) when it states that the lump sum is payable in twelve monthly instalments. In the Board's view a lump sum is a one-time payment and cannot be so called if paid in instalments. It is recommended that [paragraph] 3.7 c) be amended to remove this ambiguity.

43. Despite its conclusion in paragraph 40 above, the Board has sympathy with the Appellant's claim concerning the payment of the mobility and hardship allowance. It is most regrettable that staff members working side-by-side with staff members of other organizations in the UN common system in a field duty station are subject to different interpretations of essentially the same rules which result in their receiving significantly different allowances. The Board therefore recommends that these interpretations be aligned."

On 1 June 1993, the Secretary of the AJAB transmitted a copy of the AJAB report to the Applicant, together with a copy of the Secretary General's decision, dated 21 May 1993, accepting the conclusions of the Board and noting "The matter addressed in paragraph 43 will be studied further."

On 26 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. When ICAO approached the Applicant, it failed to inform him that it did not follow the UN Common System for terms and conditions of service.

2. The UN Common System was established to ensure minimum standards and conditions which could be applied to all staff regardless of the agency they work for.

3. The Applicant was entitled to payment of the mobility and hardship allowance under rule 3.8 of the ICAO FSSR and ST/AI/363.

Whereas the Respondent's principal contentions are:

1. Although the UN Common System seeks to attain a certain harmonization in the internal Rules and Regulations of each Agency,

each Agency has its own internal law that reflects the rights and obligations of its staff.

2. The Applicant was aware of all relevant ICAO Regulations before he accepted the offer of employment with ICAO. Rule 3.8 of the ICAO FSSR sets forth a five year continuous service requirement for the mobility and hardship allowance.

3. ICAO has fully complied with its FSSR and with the Applicant's terms and conditions of employment.

The Tribunal, having deliberated from 5 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary General of ICAO dated 21 May 1993, accepting the conclusions of the AJAB that the Applicant did not have the requisite continuous service on joining ICAO to qualify for the payment of a mobility and hardship allowance. He claims an entitlement to the mobility and hardship allowance since its inception on 1 July 1990 until 14 February 1992, together with interest. He also claims compensation for the effect on his health and state of mind caused by protracted argument and ill feeling.

II. The Applicant served with ICAO in its Technical Cooperation Programme from 13 May 1990 to 12 February 1992. He had been advised of ICAO's intention to offer him an appointment by a letter dated 4 April 1990, to which was attached a copy of the ICAO Field Service Staff Rules (FSSR) and Personnel Instructions. On 1 May 1990, the appointment was offered subject to the conditions of service set out in ICAO FSSR, as amended from time to time. Paragraph 4 of the offer stated:

> "Service under this letter of appointment shall be deemed continuous on service under the contract with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). You shall retain all rights and benefits

> accrued in respect of your United Nations service from 1 November 1987 through 12 May 1990."

The Applicant accepted and signed the offer of appointment on 17 May 1990.

III. Under the ICAO FSSR amended with effect from 1 July 1990, the Applicant was paid certain allowances pursuant to rule 3.8. Rule 3.8 provides that in order to receive payment of the mobility element of the allowance, a staff member must have five or more consecutive years of service in the UN common system in a second or subsequent duty station. Accordingly, the Applicant did not receive the mobility element of the mobility and hardship allowance because his uninterrupted service with the UN was shown by ICAO's records as being only from 1 October 1987 through 12 May 1990.

IV. From 1980 until 1987, the Applicant's UN service was continuous in four duty stations. In that period, he was on the staff of UNCTAD. In 1987, he was approached by the ILO to be Chief Technical Advisor of a project in Trinidad and Tobago. He resigned from UNCTAD with effect from 30 September 1987 and joined the ILO on 1 November 1987. The total break in his service was approximately one month. He remained in the ILO's service for over a year and one-half, separating in July 1989. At that time, he rejoined the UN and served with ESCAP until May 1990.

V. The Applicant's break in service in 1987 caused ICAO to conclude that he was not entitled to the mobility element of the allowance. Rule 3.8 of the FSSR, on which ICAO relied, clearly supports the Administration's position. It states in paragraph (b) that it is

> "... applicable, after five or more consecutive years of service in the United Nations common system in a second or subsequent duty station... Staff members ... without five

> years of such service shall be entitled to the percentage reflected in the column for '1st assignment' regardless of the number of assignments they have had."

VI. The Applicant argues that ICAO should be required to follow the same practice as the UN, as reflected in ST/AI/363. That administrative instruction, which is dated 1 August 1990 and issued with effect from 1 July 1990, provides in paragraph 29:

> "... For the purpose of establishing eligibility for the mobility element of the allowance, the requirement of five years consecutive service as a staff member (...) may be considered as met if the staff member has accumulated five years of service within a period of six consecutive years."

The Applicant's contention is that the principle of uniformity of treatment of staff members within the common system justifies reversal of the Respondent's decision and the payment to him of the mobility element of the allowance pursuant to the leeway permitted under ST/AI/363 with respect to the five-year requirement. Although the Applicant's position is one with which the Tribunal sympathizes, it cannot be sustained. The reason is that the Respondent's decision accepting the AJAB's conclusion simply does not constitute non-observance of the Applicant's contract of employment.

VII. As noted above, the Applicant expressly agreed not only to be bound by ICAO Staff Rules as amended from time to time, but also to be bound by the terms of the offer of a post made to him by ICAO dated 1 May 1990. According to that offer, he would retain the rights and benefits accrued in respect of his UN service only from 1 November 1987 through 12 May 1990. Plainly these could not include UN rights or benefits, such as the mobility and hardship allowance, which came into effect only on 1 July 1990. Nor was he to be credited by ICAO with UN service prior to 1 November 1987. The Tribunal is unable to find any legal requirement compelling ICAO to adopt, with effect from 1 July 1990, exactly the same approach as the UN did in ST/AI/363 with respect to defining the five-year continuous service requirement associated with the mobility element.

While uniformity among the members of the common system is desirable and frequently exists, there are variations in interpretation and practice that are permissible. The internal law of one organization is not necessarily applicable to others.

VIII. The Respondent points out that the language of rule 3.8 of the ICAO FSSR is in accord with the model text circulated by the Secretariat of the Consultative Committee on Administrative and Budgetary Questions (CCABQ) as an annex to the CCABQ Sessional Report, incorporating the decisions of the UN General Assembly which adopted the International Civil Service Commission's (ICSC) recommendations concerning the mobility and hardship allowance. Nothing in that annex included language providing that the five-year consecutive service requirement could be met if a staff member had accumulated five years of service within a period of six consecutive years. That suggestion appeared in paragraph A16 of an Administrative Committee on Coordination document ACC/1990/4/ADD.1 dated 29 March 1990, entitled Addendum, ARRANGEMENTS FOR THE INTRODUCTION OF REVISED PROVISIONS RELATING TO MOBILITY AND HARDSHIP EFFECTIVE 1 JULY 1990. Appended to that paragraph is a footnote indicating that UNESCO reserved its position on this "definition." The Respondent informed the Tribunal that this Addendum merely reflected the recommendations of the Field Working Group of the CCABQ, and this does not appear to be disputed. It would thus appear that the Addendum was not binding on all organizations but could be adopted at their individual option.

IX. The Tribunal notes that a somewhat comparable issue was presented to the Secretary General of the UN with regard to an administrative decision denying the Applicant an assignment allowance at the mobility rate with respect to his ESCAP service beginning in 1989. Because of the Applicant's 1987 break in UN service, it was found that he did not meet the requirement for payment of an assignment allowance at the mobility rate. However, in the exceptional circumstances of the case, the Secretary General

decided to exercise his discretion under UN staff rule 112.2(b) to grant the Applicant, as an exceptional matter, the difference between the basic rate and the mobility rate of the assignment allowance for the 1989-90 period of his ESCAP service.

X. The Tribunal recommends that the Respondent consider the possibility of a similar measure (perhaps with an adjustment to reflect the repatriation grant previously paid to the Applicant) in view of the Applicant's long, continuous service in the common system, with only one extremely short break which apparently was no greater than accrued annual leave. The obstacle blocking the Applicant's entitlement to the mobility element under a literal reading of rule 3.8 of the ICAO FSSR is rather technical in nature and it seems questionable whether, in keeping with the purpose of the mobility and hardship allowance, it was intended that staff members such as the Applicant were to be disqualified.

XI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

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UNITED
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Administrative Tribunal

Distr.
LIMITED

AT/DEC/690
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 690

Case No. 770: CHILESHE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 16 August and 26 October 1993, Jonathan Hannock Chileshe, a former staff member of the United Nations Economic Commission for Africa, hereinafter referred to as ECA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "... to set aside paragraph 22 of the Joint Appeals Board Report No. 1021, Case No. 92-79 of 16 July 1993 that limited itself only to recommending 'an indemnity equal in amount to an SPA [special post allowance] to the D-1 level for the period 1 April 1991 until (Appellant's) separation from the Organization'.
>
> 11. [To find] the sum of US$9,000 as indemnity totally insufficient. The monetary compensation fails to take account of the injury to my integrity, dignity and loss of earnings to which I would have been entitled (i.e. I used to receive DSA [daily subsistence allowance] and travel calculations were at below D-1, my hardship allowance was at a level below D-1 and the interest lost in the intervening period should be accounted for etc.) as a result of not having been promoted in the period in question indicated in paragraph 13 below.

12. ... to decide in my favour to be promoted RETROACTIVELY with effect from 22 December, 1990.

13. [To order] compensation with the support of the Tribunal for what I have suffered as stated in paragraph 11 to the tune of US$60,000."

Whereas the Respondent filed his answer on 29 June 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of ECA on 4 May 1969, as an Economic Affairs Officer at the P-3, step I level, in the Trade and Economic Co-operation Division, Trade Section, on a probationary appointment. He was granted a permanent appointment, with effect from 1 May 1971. He was promoted to the P-4 level, with effect from 1 April 1974, and to the P-5 level, with effect from 1 April 1981. The Applicant's appointment was extended for three months beyond his scheduled retirement date, to 31 January 1993, when he separated from service.

In 1990, the D-1 post of Director, Trade and Development, Finance Division, was advertised with a deadline for applications of 10 September 1990. On 15 December 1990, the names of 15 candidates, including the Applicant, were transmitted for consideration to the Executive Secretary of ECA, who, on 15 January 1991, advised the ECA Personnel Section that none of these candidates was sufficiently qualified for the post. He requested that the post be re-advertised. The post was subsequently re-advertised with a deadline of 29 July 1991.

Pending recruitment for the post, the Applicant was designated Officer-in-Charge of Trade and Development, Finance Division, with effect from 21 December 1990. His functional title was changed with effect from 1 January 1991. In a memorandum dated 2 April 1991, the Applicant requested the Chief, ECA Personnel Section, to pay him a special post allowance (SPA) at the D-1 level, with effect from 21 December 1990.

As a result of the second advertisement process, twenty-four applications were sent by OHRM to ECA for consideration on 23 August

1991. On 5 December 1991, the names of eight candidates, including the Applicant, were forwarded to the Acting Executive Secretary who had succeeded the former Executive Secretary. Discussions as to the restructuring of ECA commenced in December 1991, resulting in the postponement of a decision on the applications for the post.

In an interim report, dated 26 February 1992, the ad hoc Committee on Professional Staff Careers recommended the Applicant for promotion to the vacant D-1 post of Director, Trade and Development. On 23 March 1992, the Acting Executive Secretary wrote to the Chief, Administration and Conference Services Division (ACSD), and asked whether there was any administrative or organizational difficulty in selecting the Applicant for the post, noting that the Applicant was due to retire at the end of October 1992.

In a reply dated 29 April 1992, the Chief of ACSD advised the Acting Executive Secretary that, according to the Manual for Appointment and Promotion Committees at Offices away from Headquarters, promotions should not be granted "within a few months" of a staff member's retirement so as "to avoid the use of the promotion as a means to reward staff members for long service." At a meeting held on 6 May 1992, the Acting Executive Secretary informed the Applicant that he would not be promoted because he was approaching retirement age. On the same date, the Applicant wrote to the Acting Executive Secretary, stating, in essence, that the Administration was unjustly using the policy against promotion where retirement is imminent as a basis for not selecting him for the post, although he had been performing the functions of the post for over 17 months.

On 12 May 1992, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 post. In a memorandum dated 5 August 1992, the Chairman of the Departmental Panel for the 1992 Promotion Exercise advised the Acting Executive Secretary of ECA that the Panel "would have recommended the present Officer-in-Charge of TDFD [Trade and Development Finance Division] if this were not precluded by the

policy whereby promotion cannot take place within 6 months of a staff member's separation." On 12 August 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 16 July 1993, Its considerations, conclusions and recommendations read, inter alia, as follows:

> "Considerations
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> ...
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> 19. The Panel did not feel it necessary to establish malfeasance or misfeasance in this case. It is sufficient to note the numerous delays and the failure of management to address Appellant's legitimate claims to conclude that '... Respondent has been negligent as an employer in failing to extend to the [Appellant] fair and just treatment ...'
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> ...
>
> Conclusions and Recommendations
>
> 21. It is to be regretted that Appellant was not promoted during his service and did not have the satisfaction of recognition by the Organization of his contribution to it, as well as the pecuniary advantages. Had the Panel considered that a recommendation for his retroactive promotion was practical, it would have made it. Instead, it decided that Appellant should be adequately compensated for his services as the official in charge of the Trade and Development Finance Division (TDFD).
>
> 22. ... that Appellant be paid an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until his separation from the Organization."

On 16 July 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him of the Secretary-General's decision to accept the JAB's recommendation that he be paid "an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until the date of your separation from the service."

On 16 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not promoted because of incorrect and incomplete information regarding the policy on the promotion of staff approaching retirement, which the Personnel Section of ECA gave to the Acting Executive Secretary.

2. Delays in considering the Applicant's promotion by OHRM, by the ECA Personnel Section and by the restructuring exercise have resulted in unfair treatment.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, only a right to be considered for promotion.

2. While there was some delay in the process of selection of candidates for the vacant post, the delay was not malicious, nor an abuse of process.

The Tribunal, having deliberated from 6 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 16 July 1993, not to promote him retroactively to the D-1 level. Instead, in accordance with the recommendation of the JAB, the Secretary-General decided that following his retirement, the Applicant should be paid an indemnity equal to a special post allowance (SPA) to the D-1 level for the period from 1 April 1991 until the date of the Applicant's separation from service. Although the Applicant's retirement was originally scheduled to occur on 31 October 1992, his appointment was extended for three months until 31 January 1993.

II. The Applicant asks for a retroactive promotion to the D-1 level on the ground that, although he was at the P-5 level, he filled the D-1 post in question satisfactorily from late December 1990 until his separation. The Applicant had applied for the post

prior to being assigned thereto, along with 14 other candidates, in response to a vacancy announcement having a deadline of 10 September 1990. After the Applicant had been assigned, in an acting capacity, to the post, the then Executive Secretary of ECA decided that none of the candidates responding to the vacancy announcement was qualified. He asked that the post be readvertised, inter alia, so as to attract a qualified female candidate. This was apparently in keeping with ST/ECA/IC/90/43 dated 10 June 1990, which dealt with measures to increase the recruitment of women for high level posts. A new vacancy announcement was circulated with a deadline of 29 July 1991 and in August of that year, OHRM forwarded to ECA the applications of 24 candidates it deemed qualified for the D-1 post.

III. During the latter part of 1991, consideration appears to have been given to a possible restructuring of ECA which might have resulted, had it occurred, in a redeployment of the D-1 post in question. Before a decision was made regarding possible restructuring, the applications of eight of the candidates seeking the post were submitted to the Acting Executive Secretary who had succeeded the prior Executive Secretary. This occurred in early December 1991. On 23 March 1992, the Acting Executive Secretary inquired of the Administration and Conference Services Division as to whether there would be any difficulty in selecting the Applicant to fill the post. Presumably, this inquiry was motivated by the Acting Executive Secretary having concluded that the Applicant, who had filled the post satisfactorily for about two years, was the best qualified of the various candidates. In fact, the Acting Executive Secretary had received, about a month before, a recommendation from an Ad Hoc Committee on Professional Staff Careers, that the Applicant should be promoted to the vacant D-1 post.

IV. However, on 29 April 1992, the Acting Executive Secretary was advised by the ECA Administration that, pursuant to the policy set forth in a Manual for Appointment and Promotion Committees at

Offices Away from Headquarters, promotions should not be granted within a few months of a staff member's anticipated retirement. As a result of this and the restructuring, the Applicant was not promoted.

V. In view of the Tribunal's consistent jurisprudence holding that its review of discretionary decisions with respect to promotion is extremely limited, the Tribunal is unable to conclude that the Respondent's decision not to promote the Applicant retroactively was flawed. There was no wrongful motivation or mistake involved. On the contrary, the decision not to make an end-of-career promotion was premised on a rational policy expressed in the Manual referred to above. As the ILOAT recently said in a similar situation:

> "... promotion is at the discretion of the Organisation, which must be free to grant or withhold it in accordance with objective working requirements. It follows that any grant of promotion at the time of retirement is inherently contrary to the Organisation's interests because by then there can no longer be any question of taking on the higher level of responsibility that promotion entails. The Tribunal therefore holds that the Organisation is right to follow the policy of refusing its staff promotion which would have the sole effect of laying a burden of social costs on the institution as a whole without conferring on it any benefit in return." In re Heritier, ILOAT Judgment No. 1388 (1995).

The Applicant's plea for a retroactive promotion therefore fails.

VI. Notwithstanding the lack of entitlement to a retroactive promotion, an element of unfairness is present in the treatment accorded the Applicant. This was not adequately remedied by the grant of an SPA to him, to which he seemed otherwise plainly entitled. The unfairness consisted of letting nine months elapse after readvertisement of the D-1 vacancy without selecting the best qualified candidate, who evidently was the Applicant. This turned out to be quite harmful to the Applicant because, by the time the group of those with the best qualifications was submitted to the Acting Executive Secretary, the potential restructuring had come under consideration. This delayed even further the filling of the

D-1 post. By the time these matters were resolved, the Applicant was close enough to retirement to cause his likely promotion to the D-1 level to fall by the wayside. In the circumstances of the harm to the Applicant caused by undue delay, he is entitled to compensation which the Tribunal fixes at $7,000.

VI. In view of the foregoing, the Tribunal orders the Respondent to pay the Applicant $7,000.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary